View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of North Carolina School of Law

UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 36 | Number 1 Article 13

12-1-1957

Criminal Procedure -- General Verdict Rendered on Indictment Charging Mutually Exclusive Crimes

Emmanuel M. Paturis

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

 Part of the Law Commons

Recommended Citation

Emmanuel M. Paturis, *Criminal Procedure -- General Verdict Rendered on Indictment Charging Mutually Exclusive Crimes*, 36 N.C. L. Rev. 84 (1957).
Available at: http://scholarship.law.unc.edu/nclr/vol36/iss1/13

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

where the warrant charges assault and battery on a female, it may not be amended so as to charge assault and battery on a female inflicting serious injury.[31]

In the principal case[32] the original warrants charged that the defendants "did unlawfully and willfully trespass upon the property of *Gillespie Park Golf Course,* Greensboro, North Carolina, after having been forbidden to do so."[33] (Emphasis added.) In the superior court the warrants were amended to read: "Did unlawfully and willfully enter and trespass upon the premises of *Gillespie Park Golf Club, Inc.,* after having been forbidden to enter said premises and not having a license to enter said premises . . . ."[34] (Emphasis added.)

The court might have treated the amendment as merely curing a defect in form as in the second group of cases where the warrant charges the crime "inartfully."[35] This view would have been in conformance with previous liberal decisions of the court.[36]

The somewhat narrower view which the court took was based on the nature of the law of criminal trespass, that possession is an essential element of the crime.[37] Treating *Gillespie Park Golf Course* and *Gillespie Park Golf Club, Inc.* as separate entities and different "persons,"[38] the court found that the amended warrants charged a different crime from that charged in the original warrants. It could only follow that such an amendment was improperly allowed.

HENRY E. FRYE

Criminal Procedure—General Verdict Rendered on Indictment Charging Mutually Exclusive Crimes

By statute in North Carolina separate counts may be used in the indictment to charge separate offenses.[1] This Note is concerned with the practice of using several counts to charge separate and distinct

242 N. C. 604, 89 S. E. 2d 141 (1955).
See also, *Second Annual Survey of North Carolina Case Law,* 33 N. C. L. REV. 157, 182 (1955).
[31] State v. Goff, 205 N. C. 545, 172 S. E. 407 (1934).
[32] State v. Cooke, 246 N. C. 518, 98 S. E. 2d 885 (1957).
[33] *Id.* at 519, 98 S. E. 2d at 886.
[34] *Ibid.*
[35] See note 13 *supra.*
[36] *Ibid.* See also State v. Brown, 225 N. C. 22, 33 S. E. 2d 121 (1945).
[37] State v. Cooke, 246 N. C. 518, 520, 98 S. E. 2d 885, 887 (1957).
[38] *Id.* at 521, 98 S. E. 2d at 888.

[1] N. C. GEN. STAT. § 15-152 (1953). The statute provides: "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated . . . ."

crimes and with the problem of a general verdict rendered on an indictment charging mutually exclusive crimes.

There are many reasons for using two or more counts in the indictment. If a single count charges more than one offense, it may be subject to a motion to quash for duplicity.[2] Therefore, a separate count will be used for each offense. In cases where there is uncertainty as to how the offense was committed, several counts may be used in order to have the proof conform to the charge, each count stating in a different way the manner in which the offense was committed.[3] One count will support a conviction, and the others will be treated as surplusage.[4]

Each count within the indictment is regarded as a separate indictment, and the jury may render a separate verdict as to each count.[5] Occasionally however, separate verdicts are inconsistent. In the case of *Dunn v. United States,*[6] the defendant was acquitted of unlawful possession of intoxicants, but convicted of maintaining a nuisance by keeping intoxicating liquor for sale, although possession of the liquor was an essential element of the nuisance count. In rejecting the defendant's contention that he should be discharged because of the inconsistent verdicts, the court said that "consistency in the verdict is not necessary."[7] There is, however, authority to the contrary.[8] In the case of *Kuck v. State,*[9] the defendant was convicted of selling intoxicating liquor, but acquitted of unlawful possession of the intoxicants. In this case the court refused to affirm the conviction on the ground that an inconsistent verdict cannot stand.

In some instances the jury returns a general verdict rather than a finding as to each count within the indictment. In the recent case of *State v. Meshaw*[10] the defendant was charged in separate counts for larceny and for receiving the same stolen goods. In the lower court the jury was erroneously instructed as to the second count. The jury returned a general verdict of "guilty as charged," which carried a conviction on all of the counts within the indictment.[11] As the court

[2] See State v. Beal, 199 N. C. 278, 154 S. E. 604 (1930).

[3] In State v. Baker, 63 N. C. 276 (1869), there were four separate counts charging the same offense (first degree murder) in different ways.

[4] *Ibid.*

[5] Selvester v. United States, 170 U. S. 262 (1877); State v. Mills, 181 N. C. 530, 106 S. E. 677 (1921); 23 C. J. S., *Criminal Law* § 1403 (1940).

[6] 284 U. S. 390 (1932), 45 HARV. L. REV. 931.

[7] 284 U. S. at 393. See, Williams v. United States, 244 F. 2d 303, 304 (4th Cir. 1957), where it is said: "And it is equally well settled that a verdict of guilty on one count of an indictment is not invalidated by an inconsistent verdict of acquittal on another count."

[8] People v. Andursky, 75 Cal. App. 16, 241 P. 591 (1925); State v. Tuerk, 165 Wash. 322, 5 P. 2d 308 (1931).

[9] 149 Ga. 191, 99 S. E. 622 (1919).

[10] 246 N. C. 205, 98 S. E. 2d 13 (1957).

[11] State v. Austin, 241 N. C. 548, 85 S. E. 2d 924 (1955); State v. Hammond, 188 N. C. 602, 125 S. E. 402 (1902); Simmons v. State, 162 Ga. 316, 134 S. E. 54 (1926); 23 C. J. S., *Criminal Law* § 1403 (1940).

pointed out, however, the defendant could not have been guilty of both offenses, since the crimes are mutually exclusive.[12]

In remanding the case for a new trial, three factors governed the court's decision. First, the crimes were mutually exclusive. Second, there were erroneous instructions as to one of the counts. Third, the jury returned a general verdict of guilty which, when rendered on an indictment containing counts mutually exclusive, must be treated as a conviction as to one of the counts and as an acquittal as to the other. Since the jury had not indicated on which count the conviction was based and since the defendant could be guilty of only one of the offenses, the court ordered a new trial on the ground that the conviction may have been upon the count on which the court had given the erroneous instructions. The invalidity of one of the counts was of utmost importance, for the court stated that if the trial had been without error and if both counts had been valid, a single judgment on the verdict would have been affirmed.[13]

Prior to *State v. Meshaw* a general verdict of guilty upon an indictment charging mutually exclusive crimes in separate counts had been sustained even though one of the counts was defective on the basis of a presumption that the conviction was upon the good count.[14] This was the theory upon which the conviction was allowed to stand in the case of *State v. Beatty*[15] in which the defendant was indicted for larceny and for receiving the same goods knowing them to have been stolen. The count for receiving stolen goods was defective in that there was no averment as to the person from whom the stolen goods were received. Yet the court held the valid count would be sufficient to support a general verdict of guilty. Admitting that there are no previous cases involving mutually exclusive counts with erroneous instructions as to one of the counts, there seems to be no reason to distinguish between counts which are defective because of erroneous instructions and counts which are defective by reason of admission of incompetent evidence or

[12] In the following cases the court stated the crimes of larceny and receiving the same stolen goods to be mutually exclusive offenses: State v. Neill, 244 N. C. 252, 93 S. E. 2d 155 (1956); State v. Worthington, 64 N. C. 594 (1870); Shue v. State, 177 Ark. 605, 7 S. W. 2d 315 (1928).

[13] 246 N. C. at 209, 98 S. E. 2d at 16. *Cf. In Re* Powell, 241 N. C. 288, 84 S. E. 2d 906 (1954), where the defendant pleaded guilty to a two-count indictment charging larcency and receiving the same stolen goods. On the receiving count the defendant was given an active sentence, and on the larceny count he was given a suspended sentence. The court held that punishment could be imposed upon only one count since the defendant could be guilty of only one of the offenses.

[14] State v. Bailey, 73 N. C. 70 (1875). The defendant was charged with larceny and with receiving the same stolen goods. The accused claimed that the lower court did not have jurisdiction of the offense of receiving stolen goods. The supreme court held that even if one count were defective the valid count would support the general verdict of guilty.

[15] 61 N. C. 52 (1866).

by reason of failure to state an essential element of the crime charged in the count.[16] It appears that the court is no longer willing to sustain a general verdict of guilty to an indictment containing mutually exclusive counts when one of the counts is defective.[17]

EMMANUEL M. PATURIS

Eminent Domain—Limited Access Highways

In a recent note in this *Law Review*,[1] a question was raised as to what authority the State Highway and Public Works Commission has to create limited-access highways in this state. This question was before the North Carolina Supreme Court for the first time in *Hedrick v. Graham*.[2] In this case, an owner of land which abutted on a public highway requested an injunction to prohibit the Commission from restricting access to that highway except at certain designated points. The lower court sustained the Commission's demurrer and the supreme court affirmed. In so ruling, the court veered from its policy of strictly construing eminent domain statutes against the state.[3] Instead, the court emphasized the benefits to the public that emanate from a limited-access highway, liberally construed statutes then in effect, and found that the Commission had the power to condemn land for limited-access highways.

Three factors in particular were pointed out by the court in reaching

[16] Although State v. Toole, 106 N. C. 736, 11 S. E. 168 (1890), did not involve counts charging mutually exclusive crimes, the case clearly stated a rule of law which became the basis of later decisions. In that case the court stated that where a general verdict of guilty is rendered against an indictment charging offenses of the same grade and subject to the same or similar punishment, the verdict upon either count, if valid, supports the judgment, ". . . and it is immaterial that the verdict as to the other counts is not good, either by reason of defective counts, or by the admission of incompetent evidence, or giving objectionable instructions as to such other counts, provided the errors complained of do not affect the valid verdict rendered on this count." *Id.* at 739, 11 S. E. at 169. State v. Carter, 113 N. C. 639, 18 S. E. 517 (1893), also involved larceny and receiving stolen goods; and although both counts were declared to be valid, the court said that if only one of the counts was valid the general verdict of guilty would be placed on the good count.

[17] It is conceivable that this stand may lead the court to eventually overrule the case of State v. Baker, 63 N. C. 276 (1869). In the *Baker* case the defendant was charged in four separate counts for homicide. Evidence was given as to the first count only. The general verdict of guilty was sustained on the basis that the conviction was presumed to have been upon the valid count. If the same situation would appear in the future, the same reasoning could be applied as was used in the *Meshaw* case. Are not counts which state the same offense in different manners as mutually exclusive as the counts of larceny and receiving? Would not all defective counts, regardless of the reason, be equally unable to sustain a conviction? A general verdict of guilty is a verdict of guilty as to each count, but the defendant can be guilty of only one of the counts. If the court is unwilling to presume the conviction rested upon the valid count, there would be a new trial.

[1] 34 N. C. L. REV. 130 (1955).
[2] 245 N. C. 249, 96 S. E. 2d 129 (1957).
[3] Sechriest v. Thomasville, 202 N. C. 108, 162 S. E. 212 (1932).